No. 16057

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FOR THE NINTH CIRCUIT

MAX T. EDWARDS and GILBERT EDWARDS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Appellee accepts and adopts appellants' statement of jurisdiction.

STATEMENT OF THE CASE

A. *The Questions Involved*

Appellants were convicted of violations of 18 U.S.C. § 152 in fraudulently transferring and con-

cealing assets of a bankrupt corporation of which they were officers and agents (R. 1-13).

Max T. Edwards was convicted of eight counts and Gilbert Edwards of nine. Both were acquitted of the remaining twelve counts in the indictment (R. 38-41).

Both appellants were sentenced on Count XIX (R. 38-44), which charged that a cash register belonging to the corporation was transferred to Canada in contemplation of a bankruptcy proceeding with fraudulent intent to defeat the bankruptcy law (R. 12, 38-41). It was alleged that such transfer occurred on or about March 6, 1953 (R. 12). The proof showed that it was shipped on February 20, 1953 (R. 764).

The bankrupt was separately incorporated in Washington and in California; but at all material times the two corporations were operated as one, under the same name (R. 92, 97, 354).

Involuntary petitions in bankruptcy were filed after the transfer of the cash register. The California corporation became bankrupt, within the meaning of 18 U.S.C. § 151, on March 27, 1953 (R. 168). The Washington corporation similarly became bankrupt on May 7, 1953 (R. 168).

The twelve counts resulting in verdicts of not guilty charged transfers of six specified sums of money in contemplation of bankruptcy on six designated days in December of 1952 and January of 1953,

and conspiracies on and before each such date to effect each such transfer (R. 1-13, 38-41).

Appellants were convicted on six counts of the indictment charging concealment of the same sums of money from the creditors and from court officers in a bankruptcy proceeding, on and after May 7, 1953 (R. 1-13, 38-41). The sums of money aggregated $36,500 (R. 1-14). The sentences on those six counts are concurrent with that imposed on the offense of transferring the cash register in contemplation of bankruptcy.

Appellants were each likewise convicted and given concurrent sentences on a charge of concealing the cash register from the creditors and court officers in a bankruptcy proceeding, on and after May 7, 1953 (R. 1-14, 38-41).

Gilbert Edwards alone was charged, convicted and given a concurrent sentence on the twenty-first, and last, count of the indictment. It alleged concealment of an adding machine from creditors and court officers in a bankruptcy proceeding, on and after May 7, 1953.

The summary of appellants' argument appearing at page 25 of their brief shows that as to Count XIX, appellants contend that the Government failed to prove that the transfer of the cash register was in contemplation of a bankruptcy proceeding and with fraudulent intent to defeat the bankruptcy law.

As to the other counts which resulted in concur-

rent sentences, they assert that the Government failed to prove that the defendants had possession or control of the items of money and property described in the several counts of the indictment at the time of the appointment of a trustee; failed to prove there was a knowing and fraudulent withholding of information from the trustee or creditors; and failed to prove, as to appellant Max T. Edwards, that the offenses took place within the venue of the trial court.

From the same summary of argument, it further appears that appellants urge that submission to the jury of the counts which resulted in acquittal was prejudicial error.

The appellants likewise assert that there was reversible error in the court's rulings on evidence at the trial and in its instructions to the jury.

Without regard to the merits of the claims of error, it appears that they have been properly brought before this court by due and timely written notices of appeal from the judgments of conviction.

B. *The Indictment*

Count XIX, upon which the sentences against each of the appellants were imposed, reads as follows:

> "That on or about March 6, 1953 at Seattle in the Northern Division of the Western District of Washington, a more exact date being to the grand jurors unknown, MAX T. EDWARDS and GILBERT EDWARDS, being officers and agents

of a Corporation, to-wit, Edwards Shaver Departments, Inc., in contemplation of a bankruptcy proceeding by and against the said corporation, and with intent to defeat the bankruptcy law, knowingly, and fraudulently transfer to Vancouver, British Columbia, one cash register, the property of the said corporation."

Counts II, V, VIII, XI, XIV and XVII, upon which appellants were found not guilty, are similar in language to Count XIX. They charge transfers during December of 1952 and January of 1953, of specified sums of money aggregating $36,500.

Counts I, IV, VII, X, XIII and XVI, which likewise resulted in verdicts of not guilty, charge conspiracies to commit the substantive crimes alleged in Counts II, V, VIII, XI, XIV and XVII.

Counts III, VI, IX, XII, XV and XVIII charge concealment of the same specified sums of money from the court officers and creditors in a bankruptcy proceeding on and after May 7, 1953. Appellants were convicted of each of these charges and given sentences concurrent to that imposed on Count XIX.

Count XX charges appellants with similar concealment of the cash register. They were convicted on that charge also, and received a concurrent sentence on it.

Count XXI charges that Gilbert Edwards similarly concealed an adding machine. He was convicted on Count XXI and given a sentence concurrent with that imposed upon Count XIX.

C. *The Bankrupt*

Edwards Shaver Departments, Incorporated, the bankrupt, was separately incorporated in Washington and in California. Its business was the retailing of electric razors and related items. The Washington and California corporations were first organized in 1946, under different names, by appellant Max T. Edwards. Prior to the incorporation, he owned and operated an electric razor sales and repair business in Seattle under a trade name (R. 340, 341, 354, 447, 488, Ex. 5).

Originally, the Washington and California corporations were treated as distinct entities, but by 1952 they were operated, for all practical purposes, as one corporation (R. 92, 97). Appellant Max T. Edwards was president and the only substantial stockholder (R. 96). Appellant Gilbert Edwards, his brother, was his first assistant in the operation of the business (R. 96). Both were directors and officers (Ex. 5).

When the Washington corporation was formed in 1946, it took over the Seattle business and opened another electric razor retail store in Portland (R. 447, 448). The California corporation started similar retail establishments in San Francisco and Los Angeles (R. 449). Max T. Edwards also had a retail shaver business in Vancouver, British Columbia. It was incorporated as Edwards, Limited (R. 444). He also owned Lewis Cutlery, Limited, a Vancouver cutlery business (R. 444, 445).

During 1952 and 1953 there was an exchange of merchandise between the retail outlets of the chain. Appellant Gilbert Edwards treated the Vancouver Corporation as a branch of the corporations in the United States (R. 423-425, 431-434, 727).

In 1952 and 1953 the corporations in the United States had only one remaining store (R. 88). They had closed corporation owned stores, but had increased the number of retail outlets and the total volume of retail business by opening electric shaver concessions in major department stores on the Pacific Coast (R. 451-453, 702).

The number of concessions expanded rapidly. By 1952 Edwards Shaver Departments, Inc. (Washington and California) had concessions in the Broadway Department Stores in Los Angeles, Macy's in San Francisco, Olds & King in Portland, and Bon Marche in Seattle (R. 100, 452-453).

So far as appeared to customers, each concession was the electric razor sales and service department of the department store in which it was located (R. 86, 87).

Typically, the contract of the department stores with Edwards Shaver Departments, Inc. was to the effect that the department store would furnish space and credit facilities, as well as the use of its name, for twenty percent of the gross receipts of the department (R. 87, 88). Edwards Shaver Departments,

Inc., provided the stock in trade, employees, and advertising (R. 87, 88).

In 1952 additional concessions were opened in some of the same department stores. The new concessions sold foreign cutlery at retail (R. 464).

The razor concession contracts required the closing of any competing private store which the concessionaire had previously been operating in the city where the department store was located (R. 87). All of the stores except that in Seattle were closed to comply with such agreements (R. 88). Despite the contract with the Bon Marche in Seattle, for various reasons, the Seattle store was never closed (R. 762, 777).

While the corporations' activities had been limited to the operation of private retail electric razor stores, such stores had been very profitable (R. 279). As the operations of the corporations changed from private stores to concessions in department stores, volume increased tremendously, but the over-all operations did not show any substantial profit (R. 457. Ex. A-5, A-6, A-7, A-8).

Concession sales of $77,209.25 during part of 1949 resulted in a loss of $3,994.00 (R. 315. Ex. A-5). In 1950 there was a net loss of $2,605.25 on sales of $215,312.92 (Ex. A-6). In 1951 there was a net income of $1,332.87 on sales of $206,398.98 (Ex. A-7). For the year 1952 there are records indicating a net profit of 3.059 percent on department store sales. That record shows $8,179.22 net profit on sales of $267,-

430.88 (Ex. A-8). However, the record may be of doubtful accuracy. There was an unexplained $30,000 shrinkage of assets during 1952 (R. 750) and a claimed loss of $16,000 on the remaining private store which served as the office of the chain (R. 612, 749).

It appears that some of the concessions were, or could have been, profitable, but that the chain included poor concessions (R. 277-278, 681).

Appellants considered the opening of other similar concessions in various parts of the country and continued correspondence relative to new concessions as late as 1953 (R. 511, 512, 514, 692, 759).

During 1952, the year preceding the bankruptcy, Max T. Edwards did not receive any salary from the corporations, but did receive substantial amounts as an expense allowance (R. 279-280). During the last four months of 1952 he received $2,600 for expenses (R. 599). He testified in another court proceeding that $300 per month of such allowance constituted salary (R. 599, 600). Appellant Gilbert Edwards received a salary of $350 per month plus an expense allowance (R. 702).

D. *The Bankruptcy*

While the bankruptcy of Edwards Shaver Departments, Inc. was preceded by a relatively lengthy history of financial difficulty, the immediate precipitating cause of the bankruptcy was an attachment in a California state court on February 27, 1953

(Ex. A-26). The attachment caused concession agreements to be cancelled (R. 518-519, 521, Ex. A-1, A-27).

On March 11, 1953 a receiver was appointed by a state court in Washington on application of a petitioning creditor (R. 168). On March 27, 1953 an involuntary bankruptcy petition was filed in California (R. 168). A similar petition was filed in Federal court in Seattle on May 7, 1953 (R. 168). A receiver was appointed in the California bankruptcy case on March 27, 1953 (R. 98). The record does not disclose the date on which a receiver or trustee was first appointed by the Federal court in Seattle, but the first adjudication of bankruptcy in Washington was on May 27, 1953 (R. 168).

The bankruptcy proceedings in California were dismissed on the condition that all of the assets be transferred to Washington, and that the two corporations be treated as one for purposes of the proceedings (R. 169). [The corporations had been operated as one business before the bankruptcy (R. 92, 97)]. All subsequent administration of the bankrupt's affairs was by the bankruptcy court in the Western District of Washington (R. 169).

The bankrupt had liabilities of $123,000 and assets with a book value estimated between $60,000 and $70,000 (R. 555. Ex. 3). The appellants agreed that a realistic book value was in the neighborhood of $60,000 (R. 554, 745). The liquidation value of the assets was less than $60,000 (R. 554, 695). The even-

tual distribution to general creditors of the bankrupt was about 16¾% of the amount of the claims (R. 250). Included in the amounts paid to creditors was money received by the trustee in settlement of a suit commenced by him, in Canada, against Max T. Edwards and others. That settlement was in the amount of $10,000 (R. 525-526). The record does not show what expenses the trustee incurred, either for the suit in Canada, or for other purposes in connection with the orderly liquidation of the estate of the bankrupt.

E. *The Evidence That the Tranfers of Money and Machinery Took Place*

It is not necessary to refer the Court to the items of evidence which, taken together, establish that there were transfers to Canada of the cash register and of the sums of money which were alleged and set forth in the indictment. Appellants took the stand, and each admitted that such transfers took place, but denied that the transfers were fraudulent or in contemplation of bankruptcy. They further admitted the approximate accuracy of the dates of such transfers alleged in the indictment, except that Max T. Edwards disagreed with the charge in Count XIX that the cash register was transferred on or about March 6, 1953, and correctly stated that it was transferred some time in February (R. 532-533, 740-741). It was actually shipped on February 20, 1953 (R. 764. Ex. A-34), although it did not pass customs in Canada until some time in March (R. 228-229. Ex. A-34).

F. The *Evidence As to Possession of the Money and Machinery After Bankruptcy*

The Government did not introduce any evidence as to what occurred to the money, the cash register, or the adding machine after the transfers became complete. Its *prima facie* proof of possession after bankruptcy consisted of proof of the transfers and of the circumstances under which such transfers were made.

Appellants each testified in their own case that the adding machine and the cash register were in the possession or under the control of Max T. Edwards at all times after May 7, 1953 (R. 533, 741). Max T. Edwards would have returned the adding machine if Gilbert Edwards had asked for it (R. 533).[1] Gilbert Edwards testified that the cash register was purchased by a Canadian corporation of Max T. Edwards (R. 766).

Appellants produced records showing that bank loans had been made to Max T. Edwards and his Canadian corporations during 1952 and were subsequently repaid (Ex. A-17, - A-21).

Max T. Edwards testified that all but about $10,000 of the $36,500 transferred from the corporation was used to repay bank loans made for the exclusive benefit of the business in the United States

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[1] It is to be noted that the words "cash register" were used in place of "adding machine" in two questions appearing at Page 533 of the Record.

(R. 534). He denied that it was ever necessary to borrow money for either of his Canadian corporations (R. 623). But defendant's Exhibit A-28 showed that Lewis, Ltd., one of the Canadian corporations, had a bank overdraft of $2,589.89 and a bank loan of $5,000. A record similar to Ex. A-28, but relating to Edwards, Ltd., the other Canadian corporation of Max T. Edwards, was available to appellants, but not offered at the trial (R. 529).

Max T. Edwards testified as to certain cash disbursements following his receipt of $36,500 from the United States corporations (R. 490-506). He could not recall all the details of his disbursements (R. 497). Some money went into a real estate investment in the name of Mrs. Edwards, who purchased an apartment house (R. 604). Max T. Edwards received $10,000 in notes from Mrs. Edwards covering that investment (R. 604).

The only admitted income of Max T. Edwards in 1952 was a total of $8,750.00 from his Canadian corporations (R. 628). However, one of those corporations purchased a yacht for which it had slight need (R. 535). The boat was a used 55 foot twin screw motor vessel (Ex. A-28). Max T. Edwards testified that he paid approximately $6000.00 for it when he purchased it on November 21, 1952 (R. 625-626). The price was paid in monthly installments with five hundred or a thousand dollars as an initial payment (R. 626).

Max T. Edwards could not recall how much money he had on May 7, 1953 (R. 605). When asked if it was $5.00 or $5,000, or more than $5,000, he answered, "I wouldn't have any idea" (R. 604-605). He denied knowing the value of his interest in Edwards, Ltd., of which he was the largest stockholder (R. 538, 605).

Max T. Edwards testified, on direct examination, that the $36,500 was spent before the bankruptcy occurred (R. 483-506). On cross-examination, he admitted that on May 7, 1953 (when both the Washington and the California corporations had become bankrupt (R. 168)), he still had some proceeds of that money; i.e., the $10,000 note and money in an unspecified sum (R. 605). His excuse for not turning those assets and the adding machine and cash register over to the trustee was that: "I wasn't asked to" (R. 605). He gave a similar reason for not advising the receiver of the ownership of a profitable private brand of shaver accessories which had wide consumer acceptance and which appellants still sold at the time of trial (R. 549-553).

There was documentary evidence that the trustee not only asked for money, but sued to recover it. He received $10,000 in settlement of that suit (Ex. A-29).

G. *The Evidence of Intent With Relation to Count XIX*

The facts with relation to Count XIX are here set forth in some detail because the primary sentence was imposed on it. Other sentences were concurrent to that imposed on Count XIX (R. 38-41). As has been stated, Count XIX charged that appellants, as officers and agents of Edwards Shaver Departments, Inc., knowingly and fraudulently transferred a cash register to Vancouver, B. C., in contemplation of a bankruptcy proceeding by or against their corporation and with intent to defeat the bankruptcy law. The shipment of the cash register to Canada on or about February 20, 1953 was admitted by appellants at the trial (R. 532, 533, 740, 741). Their status as officers and agents of the bankrupt is clear (R. 96, 756, Ex. 5, 24). The Government's remaining burden on this charge was to show that the transfer was in contemplation of a bankruptcy proceeding by and against Edward Shaver Departments, Inc., and that such transfer was knowing and fraudulent with the intention of defeating the bankruptcy law. The Government's proof of that state of mind of appellants was circumstantial. It is outlined below.

G1. *Financial Condition of the Corporation and Difficulties in Obtaining Merchandise*

The dollar volume of the business done by Edwards Shaver Departments, Inc., increased very rapidly (R. 457). Due to a lack of capital, supplies of

merchandise necessary to maintain a high sales level could be kept on hand only if they were obtained from manufacturers and wholesalers on relatively long-term credit arrangements (R. 474-475).

Until 1951, Remington was one of the larger suppliers and the largest creditor (R. 103). However, during and after 1951, the corporations were able to get credit from Remington for only such amounts as could be paid within twenty days (R. 771). While still getting good credit from Remington, Edwards Shaver Departments, Inc., also purchased part of its stock in trade from other suppliers (R. 105). Some time after it discontinued large purchases from Remington, large quantities of goods were obtained from Marshall-Wells (R. 105). By the end of the year 1951, Marshall-Wells was the largest creditor (R. 106), but there were no purchases on credit from Marshall-Wells in 1952 (R. 767).

In order to avoid legal action which would have closed Edwards Shaver Departments, Inc., appellants entered into an arrangement with Marshall-Wells whereby Marshall-Wells reduced the obligation approximately 8%, received $5,000 in cash and the balance in interest-bearing trade acceptances (R. 768. Ex. A-15). Gilbert Edwards did not consider that an out-of-the-ordinary transaction for Edwards Shaver Departments, Inc. (R. 768).

Cut off from supplies from Marshall-Wells and Remington except on a cash or near cash basis, the cor-

poration began buying larger quantities of material from General Electric, Graybar, and other suppliers (R. 767, 768, 771. Ex. 2).

During the early fall of 1952 Hall Company agreed to extend credit up to $5,000 (R. 237). Hall Company was a new corporation, resulting from the merger of a wholesale jewelry company and a wholesale appliance company (R. 235). Its comptroller had been with the appliance distributing company (R. 235). The jewelry company had engaged in the wholesale sale of electric shavers and parts (R. 236).

Hall Company was three to four weeks behind in posting its own books (R. 240). Due to such bookkeeping shortcoming and to carelessness in the comptroller's office of the Hall Company, over $40,000 of merchandise was sold on credit to Edwards Shaver Departments, Inc., despite the $5,000 limit placed by the Hall Company comptroller (R. 240). He did not learn that such an amount of credit had been extended to the Edwards company until around Christmas of 1952 (R. 240).

Only token payments were made to the Hall Company (Ex. 2). Other suppliers received payments substantially less than the amount of their invoices during the latter half of 1952 (Ex. 2). As a result, obligations of Edwards Shaver Departments, Inc., as of the end of 1952 approximated $123,000 (Ex. 3). The book value of assets was then $60,000 (R. 554). The financial position of the company, as of the end of 1952,

was approximately $60,000 worse than it had been twelve months before (R. 748).

G2. *Unexplained Loss During 1952*

Appellants testified that Edwards Shaver Departments, Inc., lost $60,000 in 1952 (R. 555, 743-750). There was evidence that the concessions made a profit during 1952 (R. 748) and that there was only one private store still operated during 1952 (R. 749). That store may have lost $16,000 during the year 1952 (R. 338, 749). (But see Appendix A, infra, to the contrary). Part of a loss on a California store closed at an earlier date was written off the books in 1952. The remaining $30,000 of the total $60,000 loss during 1952 could not be explained by Gilbert Edwards (R. 750).

G3. *Shipments of Inventory Items to Canada*

There was evidence from which the jury could either infer that the unexplained loss of $30,000 during 1952 was due to shipments of electric shavers and parts to the Canadian corporations, or find, as appellants testified, that the Candian corporations shipped merchandise to the Washington corporation which was more valuable than the shavers and parts sent to Canada from the United States. All parties agree that shavers were shipped to Canada and that cutlery was sent to the United States, but there was conflicting evidence as to the extent of those transactions.

A bookkeeper employed by Edwards Shaver Departments during the last half of 1952 and early 1953,

testified that during all the time that she worked for the firm, one of her duties was to make up invoices for shipments of electric shavers to Edwards, Ltd. (R. 423-424). Most shipments were of quantities having a retail value of at least several hundred dollars (R. 425). She would file copies of the records of shipment in the Seattle office (R. 428), but did not see any of such copies after the state receivership was in effect (R. 428), although she was employed for the first two weeks of the receivership (R. 425). Those records were not on hand when the receiver took over the store (R. 277, 280).

Appellants, on the other hand, each testified that cutlery and similar merchandise was shipped from the Canadian corporations to those in the United States and that shavers and parts were shipped from the United States to Canada. They introduced records showing some such shipments from Canada to Seattle (Ex. 50, A-31).

Max T. Edwards testified that there once had been other similar records (R. 629).

Appellants testified that a contra-account was kept by a secretary in the Vancouver store, and that at the end of 1952, there was a balance of approximately $7,000 due the Canadian corporation (R. 528, 529, 756). They did not make any claim for that balance in the bankruptcy proceeding (R. 614). They asserted that all copies of all records covering shipments from Seattle to Vancouver were kept in Van-

couver (R. 525, 755). Such records were purportedly destroyed by accident after having been submitted to the attorney for the Washington bankruptcy trustee, for his inspection, in the course of the Canadian suit by the trustee against appellants and others (R. 526).

Gilbert Edwards admitted that two copies of invoices were made for at least some shipments, from Seattle to Vancouver, and that there was no reason why both copies should be kept in Vancouver (R. 755-757).

Max T. Edwards testified that most cutlery sold by Edwards Shaver Departments, Inc. was shipped from one of his Vancouver corporations which, in turn, imported from factories in Europe (R. 464). On cross-examination he admitted that cutlery was imported directly from Europe to Seattle by Edwards Shaver Departments, Inc. and that when, as a matter of expediency, some German and Swedish cutlery was shipped to Vancouver from Seattle, it involved paying duty twice (R. 598). A clerk employed by Edwards Shaver Departments, Inc. testified that the cutlery she recalled came from Sweden and Germany, although some may have come from Vancouver (R. 431).

G4. *Missing Records of the Bankrupt*

The records of the corporation left for the receiver did not include a single record or even a memorandum relating to any shipment of merchandise to Canada (R. 280). Records of the corporation purported to be complete for the years 1952 and 1953 were turned over

to the state court receiver (R. 277). Records for earlier years were not given to him (R. 277), nor were all of the 1952 and 1953 records actually surrendered to the receiver. Max T. Edwards produced some of them at the trial (R. 578. Ex. A-13, A-14, A-25, A-31, A-32, A-33). He made excuses for his failure to give some of those records to the receiver or trustee (R. 545, 578-579, 629).

G5. *Evidence of Plan to Have Concessions Operated By New Corporation Free of Old Debts and Old Contracts, After Bankruptcy of Old Corporation*

There was evidence that some of the concessions, such as Macy's in San Francisco and Bon Marche in Seattle, were profitable (R. 277-278). Others, such as the Weinstock-Lubin outlets had possibilities (R. 277-278). The Broadway group would only have been good if it was possible to operate in some, but not all of the Broadway stores (R. 277-278). Some concessions were not profitable (R. 681). It was apparently possible to open other concessions in large department stores where they may have been profitable (Ex. A-10, A-11, A-12, A-13, A-14, A-25). Appellants had the "know-how" to operate such concessions (R. 744).

But, as of the end of 1952, the Edwards Shaver Departments, Inc. was in apparently hopeless financial condition with liabilities of $123,000 and assets with a book value of $60,000 (R. 554, 745). It was also burdened with contracts requiring it to operate unprofitable concessions (R. 278, 565), and had a

lease on a store in Seattle that required payment of $500 a month rent for three more years (R. 608).

It was under these circumstances that on February 18, 1953, articles of incorporation were filed in Nevada for a corporation named "Shaveraids, Inc." (Ex. 26, R. 559). That was just two days before the shipment of the cash register to Canada. One purpose of the corporation, as shown in the articles of incorporation, was the operation of concessions for the sale of electric razors (Ex. 26).

The money for the new corporation, including its initial bank balance of $1,000, came from Edwards Shaver Departments, Inc. (Ex. 12, 35, 36, 37, 38. R. 145, 395-409, 741-742). Appellants claimed that the $2,000 of Edwards Shaver Departments, Inc. funds that went into the accounts of "Shaveraids, Inc." and a similar new corporation called "Cutlaire, Inc." was repayment of $1800 previously loaned to Edwards Shaver Departments, Inc. by Gilbert Edwards and an advance of $200 to Gilbert Edwards (R. 171), but the $2,000 check was entered in the records of Edward Shaver Departments, Inc. as a miscellaneous expense (R. 147).

Appellants also claimed that Shaveraids, Inc. was caused to be formed by Edwards Shaver Departments, Inc. for the merchandising of a brand of products of that name which was put out by Edwards Shaver Departments, Inc. (R. 483, 512, 549-550, 675).

Shaveraids, Inc. purchased all of the Bon Marche

assets of Edwards Shaver Departments, Inc., from the state court receiver for $1900 on April 3, 1953, after negotiations between Gilbert Edwards and the receiver (R. 370, 372). As of the time of the trial, Shaveraids, Inc. still operated the Bon Marche concession (R. 552, 742). Gilbert Edwards, on behalf of Shaveraids, Inc., made a similar attempt to purchase the physical assets of some of the Broadway concessions, but was not successful (R. 742). He testified on cross-examination that if he had been able to buy the physical assets, he would have carried on the concession business in California, just as he did in the Bon Marche (R. 743).

Cross-examination of Max T. Edwards included the following questions and answers (R. 559-560):

Q. Do you know when that corporation [Shaveraids, Inc] was established?

A. I think it was established in January of '53.

Q. Would it refresh your recollection if I tell you that Exhibit 26 in evidence shows that the articles of incorporation were filed February 18, 1953? If you don't know, you can just so state.

A. No, I don't know.

Q. Now, isn't it a fact, Mr. Edwards, that it was the [552] intention of Gilbert Edwards and yourself to arrange contracts with the various department stores that had concessions which had proved profitable to Edwards Shaver Departments, Inc. in the past whereby under the new corporation, Shaveraids, Inc., you and your brother would continue the old

business in the United States department stores?

A. I would qualify that to the extent that it wasn't me and my brother.

Q. Well, what was your intention in that regard?

A. I had no intention.

Q. Well, you said you were going to qualify what I had suggested by saying, 'It wasn't me and my brother,' if I remember your words.

A. My knowledge was that my brother probably would proceed on his own.

Q. Well, now, rather isn't it a fact that you had found that the entire operation in the United States was not profitable, you were saddled with a lease on the Seattle store that required payments of $500 a month in rent, that the corporation had obligations to outsiders of $123,000, and that you hoped to continue the operation without the drain of the Seattle store and without the drain of having to pay creditors for merchandise supplied in the past, and didn't you so advise an acquaintance of yours in [553] writing?

A. I don't think so in just that way.

The writing referred to in the last above quoted question is Ex. 40, which is the the original of a letter, dated May 15, 1953, written by Max T. Edwards to a friend (R. 567, 576, 577), and produced by the Government at the trial (R. 561). It includes the following words of Max T. Edwards:

"* * * You must surely have received a letter from us quite some time ago, advising you directly of the change in our United States corporation

set-up! I am sure you did, but you probably did not pay proper attention to it. It was necessary to let the old corporation go by the boards in order to abrogate the old contracts with the department stores, but more especially, in order to kill the lease on the old Seattle store. You are aware of the fact that we have been trying to sell that store, or get rid of it for almost a year, and the landlords would not release us from our commitments from the lease. * * *

"P.S. For your further information, Shaveraids, Inc. purchased for cash all of the assets, lock, stock, and barrel, of Edwards Shaver Departments, Inc."

Max T. Edwards cooperated in attempts by Gilbert Edwards to obtain concessions for Shaveraids, Inc. (Ex. 22-23). It is to be noted that in support of that attempt by Gilbert Edwards, Max T. Edwards wrote to a department store and denied that any money was withdrawn by him to Canada and stated that any money taken out of Edwards Shaver Departments, Inc. was exactly the amount loaned by a bank and required to be paid back to the bank (Ex. 22). As has been shown (this brief, pp. 12-14), the amounts withdrawn by Max T. Edwards from Edwards Shaver Departments, Inc. in December of 1952 and January of 1953 exceeded by at least $10,000 the amounts then paid to banks, either directly or indirectly, on behalf of Edwards Shaver Departments, Inc., even if none of the money borrowed from banks had been used for the benefit of either of his Canadian corporations.

The attempts to arrange concession agreements for Gilbert Edwards were made during March and

April of 1953 (R. 588. Ex. A-27, 22, 23). That was done while the inventory of Edwards Shaver Departments, Inc. was held first by state officers in insolvency proceedings, and later by such a state receiver in Washington and by a bankruptcy receiver in California (R. 98, 168-169). The inventory had relatively little value, if sold at a forced sale of shavers and parts, as distinguished from a sale of a shaver sales and service business (R. 665-666, 695). Such eventual forced sale of inventory apparently produced only a small return, as the creditors received less than 17% from the trustee, although the inventory had a book value approximating fifty percent of the liabilities (R. 249-251, 99-100, 541, 695).

When Gilbert Edwards succeeded in getting the new concession at the Bon Marche, he and his corporation became the only logical bidders for the assets on hand in the store (R. 370-373).

G6. *Payment of Money Owed to Max T. Edwards by His Corporations in the United States*

Edwards Shaver Departments, Inc. owed Max T. Edwards sums of money which he had loaned to it. As an unsecured creditor of the corporation he was second only to the Hall Company at the end of 1952 (R. 107, 118. Ex. A-4, Ex. 2). There is evidence that Max T. Edwards was not then fully aware of the extent of the financial crisis that faced his corporation (R. 317-318). However, it appears from cross-examination of Gilbert Edwards that there was a unit in-

ventory control which showed the day-by-day sales of each department. It made it possible to determine the approximate financial condition of the corporation at all times (R. 739-740). Assets at the end of 1952 approximated $60,000 and liabilities $123,000 (R. 554, 745).

It was under these circumstances that Max T. Edwards wrote to the department stores where the corporation had concessions and asked for advance payment against amounts due to the concessionaire, but not payable until the 10th of January, 1953 (Ex. 17, 20, 21). Substantial advances were received from the department stores (R. 414, Ex. 17, 20, 21). The appellants then caused $36,500 to be sent to Canada (R. 532, 740).

That total sum was slightly larger than the amount that was owed to Max T. Edwards, because balanced against the amounts he had advanced to the corporation, there was an unpaid stock subscription of Max T. Edwards and an obligation for a Cadillac automobile which was transferred to him by the corporation (R. 122).

The excess amount transferred to Canada was returned to the corporation early in 1953 with the net result that Max T. Edwards was paid, from the ineventually received slightly less than 17% of the solvent corporation, neither more nor less than it owed to him (R. 122, 614). The other unsecured creditors amounts owed to them (R. 541).

G7. *Events Coincident in Time With the Transfer of the Cash Register*

On February 17, 1953, an order was placed with Bekin Van and Storage Company for shipment of the cash register to Vancouver, British Columbia, Canada (Ex. A-34). On the same day, a letter explaining the fact that the corporation could only stay in business with the cooperation of the major creditors was sent to such creditors (R. 631-634. Ex. A-33). The cash register was picked up by the movers on February 20, 1953 (Ex. A-34). On February 25, 1953, a representative of the Hall Company had a discussion with Max T. Edwards and was told that Max T. Edwards proposed paying 25% of the amount due the Hall Company in full settlement of the obligations to the Hall Company, but that such payments would be over a period of one year (R. 242). Max T. Edwards denied having made any such suggestion (R. 509). Shaveraids, Inc. was incorporated February 18, 1953 (Ex. 26).

G8. *The Transfer of the Cash Register*

A clerk employed by Edwards Shaver Departments, Inc., testified that she came into work one morning early in 1953 and found that a late model cash register, some office furniture, and an adding machine were gone (R. 421-423). An old cash register and some old furniture replaced the missing newer items (R. 423).

The state court receiver discovered that an old cash register had been merely borrowed from a supplier in town, and returned it to him (R. 356). The missing cash register had been purchased a year and a half earlier from the National Cash Register Company (R. 128) for $475.00 (R. 766). It was invoiced to the Canadian corporation for $126, but no records of the Canadian corporation were produced at the trial to show whether even that modest sum was credited to the Washington corporation (R. 766).

Gilbert Edwards testified that the cash register was shipped to the Canadian corporation and a rented machine substituted in the Seattle store because the Seattle store was in process of being closed (R. 761-765). He claimed there was greater use for the cash register in Vancouver than in Seattle, but admitted that no emergency required its immediate transfer and the renting of another machine (R. 763).

Both Max T. Edwards and Gilbert Edwards insisted in their testimony at the trial that the Seattle store was being closed (R. 608-609, 761). There was evidence to the contrary.

A concession arrangement with Bon Marche in Seattle started in 1949. The written agreement for the concession required closing of the Seattle store (R. 777). Some time after entering into that contract with the Bon Marche, Edwards Shaver Department, Inc. signed a lease for a new location for the Seattle store (R. 770-771). As of the time when the cash reg-

ister was transferred to Canada, the lease on the new store premises had three years to run, and required payment of $500 a month rental (R. 608).

The store had once been offered for sale for $18,000, plus inventory (R. 612). It did not sell and Max T. Edwards testified that he intended to close it down and continue to pay the $500 a month rent for three additional years (R. 608-609).

The store was the headquarters for training personnel (R. 720) and had an even more useful purpose as the office of the chain of Shaver concessions (R. 612). As a matter of arithmetic, it appeared either to be a profitable operation at the time when appellants purportedly intended to close it and continue paying rent on the space, (R. 608-611), or that it at least would have been profitable if the rent was eliminated from consideration (Appendix "A"). (The rent was payable even if the store was closed.)[2]

Max T. Edwards denied that the Seattle store gave him a bargaining position with the Bon Marche in an attempt to obtain a larger percentage for the concession operation (R. 596). He admitted that the

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[2]The record shows (R. 609) that Max Edwards was asked on cross-examination if the Seattle store did not do an average of $6000 or $7000 a month total gross business and the witness agreed that such was possibly a fair estimate. An analysis of Ex. 47 shows that the total gross business was only approximately $4000 per month on a year round average. The analysis is set forth as Appendix "A" to this brief. It shows, among other things, that the store, using the generous expense allowances set out at pages 610-611 of the record, lost money only because of the high rent which would have continued even if the store was closed.

store was directly across from the Bon Marche and was selling the same merchandise and providing the same services (R. 596). A slight change in the percentage arrangements with the department stores would have made the Edwards Shaver concessions profitable (Ex. A-5, A-6, A-7, A-8).

Max T. Edwards testified on direct examination that most of the Shaver business was referred from the Seattle store to the Bon Marche, and that the store became fundamentally a gift shop with various types of gifts, mostly cutlery (R. 478).

On cross-examination, Max T. Edwards was confronted with records and admitted that only a small percentage of the sales of the Seattle store were of cutlery, the bulk of the business being in Shavers, shaver repairs and shaver accessories. The sales records of the store so showed, (R. 589-594. Ex. 47). Exhibit 47 (sheet entitled "Department Transactions") also shows that 279 electric razors were sold by the Seattle store during the last three months of 1951, and that during the same months of 1952, 450 were sold by the same store. The same record sheet shows that the Bon Marche sales of razors increased in the same period, but at a slower rate.

G9. *Other Evidence of the State of Mind of Appellants on February 20, 1953*

There was evidence, as against appellant Gilbert Edwards only, that directly showed his state of mind on February 27, 1953, seven days after the cash reg-

ister was shipped to Canada. He described Max T. Edwards as "a fool" for bringing $3,000 back from Canada and depositing it to the credit of Edwards Shaver Departments, Inc. (R. 132, 134). (If Max T. Edwards had not returned that money, he would have taken more from the bankrupt than he advanced to it (R. 122)).

There was evidence, as to Max T. Edwards only, that he attended a creditors meeting on February 25th or 26th, 1953 (R. 241, 244) and that he refused to agree to a suggestion that Edwards Shaver Departments, Inc. borrow about 50% of the amount of its obligations from the department stores and work out long-term payments on the balance (R. 243). Max T. Edwards' best offer to the creditors was to pay $20-$25,000 to the three larger creditors on obligations approximating $80-$85,000, provided he could get advances from the department stores (R. 247-248). Max T. Edwards denied that he ever made any such suggestion at the creditors' meeting (R. 539, 542).

Cross-examination of a Government witness disclosed that Mr. Max T. Edwards stated on February 26 or February 27, 1953, that he feared Horn & Cox would take some kind of action (R. 272). Max T. Edwards, on the other hand, testified on direct examination that the attachment by Horn & Cox which precipitated the involuntary insolvency proceedings came as a "bolt out of the blue" (R. 517). On cross-examination he admitted that he had some warnings from Horn & Cox, but didn't think that they were any

more threatening than the average collection letters (R. 544). He agreed that he had kept the Horn & Cox correspondence, and did not know why it had not been left in the files of the corporation for the receiver (R. 544-545). In any event, Exhibit A-26 establishes that on February 27, 1953, all property at retail outlets of Edwards Shaver Departments, Inc., at nine separate locations in the Los Angeles area, were attached on the suit of an assignee of Horn & Cox. Bankruptcy soon followed.

SUMMARY OF ARGUMENT

Appellants, as officers and agents of Edwards Shaver Departments, Inc., caused its cash register to be transferred to Canada. There was ample evidence to sustain the finding of the jury that such transfer was knowing and fraudulent and that it was in contemplation of a bankruptcy proceeding against the corporation or with intent to defeat the bankruptcy law. Concealment is not an element of that crime, which was complete before bankruptcy began.

All evidence adduced at the trial was material to the issues created by the charge of transferring that cash register. Even the evidence introduced for the primary purpose of showing guilt or innocence as to other Counts in the indictment tended to show appellants' state of mind when they caused that transfer. Further, the sanctions imposed on other counts consisted of terms of imprisonment concurrent with, rather than consecutive to, the sentence imposed on the

crime of transferring the cash register in contemplation of bankruptcy. Accordingly, the judgment should be affirmed without regard to the appellants' guilt or innocence of the other charges.

In any event, appellants were properly convicted of the other charges, which involved concealment of property of the bankrupt after bankruptcy.

Nor should the convictions be reversed because of alleged error in the court below. There was no prejudicial error.

POINT I

APPELLANTS WERE PROPERLY CONVICTED OF TRANSFERRING THE CASH REGISTER TO CANADA

Count XIX, upon which the primary sentence was imposed, charged knowing and fraudulent transfer of the cash register by agents of the corporation in contemplation of bankruptcy of the corporation and with intent to defeat the bankruptcy law. It did not charge concealment of the cash register. Concealment is not a necessary element of the crime although concealment, with or without transfer, is also an offense. *Shapiro* v. *United States*, 101 F. 2d 375 (C.A. 7, 1939), cert. den., 306 U.S. 657, 83 L.Ed. 1054, 59 S.Ct. 744; *Viles* v. *United States*, 193 F. 2d 776 (C.A. 10, 1952), cert. den., 343 U.S. 915, 76 L.Ed. 1330, 72 S.Ct. 650.

In the Shapiro case the court held (101 F. 2d 375,379):

> "As to the bulk transfer transaction, it is appellants' contention that concealment as well as the

transfer itself is necessary. The statute provides that the offense is complete if the corporate agent "concealed or transferred" any of the corporate property in contemplation of bankruptcy or with an intent to defeat the operation of the Bankruptcy Act. The object of Congress in passing this criminal statute was to punish those debtors who, although wanting relief from their debts did not want to surrender what property there was to the creditors. Under such circumstances the objective of the criminal statute is defeated either by a transfer or a concealment. Therefore, it seems to us that the statute was meant to condem either a transfer or a concealment. A statutory condemnation follows *a fortiori* where, as in the instant case, the transfer was in bulk and to a personally controlled transferee. This construction of the statute is strengthened by a later amendment which expressly eliminates problems of construction thereafter by substituting the words "concealed or, with or without concealment, transferred." 52 Stat. 855, 11 U.S.C.A. § 52 (b) (6). That a District Court has held that concealment was an essential element does not disturb our construction of the statute. U. S. v. Posner, D.C., 3F. Supp. 252."

As was held in *Coghlan* v. *United States*, 147 F. 2d 233, 237 (C.A. 8, 1945), cert. den., 325 U.S. 888, 89 L.Ed. 2001, 65 S.Ct. 1569:

"The crime is complete when the act of concealment or transfer is completed with criminal intent. United States v. Knickerbocker Fur Coat Co., 2 Cir. 66 F. 2d 388. Section 29, sub, b(6) as amended, defines a criminal concealment as one in contemplation of bankruptcy, thus eliminating the necessity of continuity required in the cases prior to the enactment of this amendment."

The Knickerbocker decision of the second circuit, which was cited in the above quotation, points out that it is not even necessary for bankruptcy to ensue, if contemplation of it, or intent to defeat the bankruptcy laws, motivated the concealment or the transfer. *United States* v. *Knickerbocker Fur Coat Co.* 66 F. 2d 388, 389-390 (C.A. 2, 1933), cert. den., 290 U.S. 673, 78 L.Ed. 581, 54 S.Ct. 91.

A transfer is fraudulent under the bankruptcy law if made within one year of bankruptcy with actual intent to hinder, delay or defraud either existing or future creditors. 11 U.S.C. § 107 (d)(2)(d).

The elements of the crime charged in Count XIX are: (a) status as agent or officer of the corporation; (b) contemplation of a bankruptcy proceeding by or against the corporation or intent to defeat the bankruptcy law and (c) knowing and fraudulent transfer.[3]

The status of appellants as officers and agents of Edwards Shaver Departments, Inc. and the fact of the transfer of the cash register on February 20,

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[3]The crime alleged in Count XIX is a violation of the provisions of the sixth unnumbered paragraph of 18 U.S.C., Section 152. The other counts in the indictment, which resulted in conviction, are under the first paragraph of that section.

All of Section 152 of Title 18 has been taken, with modifications, from Section 29(b) of the Bankruptcy Act of 1898. Unnumbered paragraph 1 of Section 152 is the present equivalent of subdivision 1 of Section 29(b).

In the 1898 Bankruptcy Act Subdivision 1 covered concealment by a bankrupt of his own property. By the 1926 amendment (44 Stat. 662) Subdivision 1 was broadened to cover concealment of property of the bankrupt from the trustee or other court officer by any person. That 1926 amendment also added a new Subdivision 6 to Section 29(b). That new subdivision is the predecessor of the sixth unnum-

1953, are not disputed, but appellants contend that the Government failed to prove that the transfer of the cash register was in contemplation of a bankruptcy proceeding or with intent to defeat the bankruptcy law and was knowing and fraudulent.

The Government's evidence of appellant's state of mind was necessarily circumstantial. *Walters* v. *United States*, 256 F. 2d 840, 841 (C.A. 9, 1958). That does not mean that this court should weigh the evidence to determine if the circumstantial evidence was consistent with any hypothesis other than that of guilt. That is a function of the jury. *Lattanzio* v. *United States*, 243 F. 2d 801, (C.A. 9, 1957); *Walters* v. *United States*, supra; *McCoy* v. *United States*, 169 F. 2d 776 (C.A. 9, 1948), cert. den., 335 U.S. 898, 93 L.Ed. 433, 69 S.Ct. 298.

The rule set forth in *Glasser* v. *U. S.*, 315 U.S. 60, 80 provides the standard to be applied by this Court. That rule was quoted and relied upon, in *Blassingame* v. *United States*, 254 F. 2d 309 (C.A. 9, 1958):

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bered paragraph of present § 152 of 18 U.S.C., under which the cash register transfer charge in the present indictment was drawn. No such crime of transfer in contemplation of bankruptcy existed before 1926.

The Chandler Act of 1938 amended Subdivision 1 to add concealment from creditors to the prior offense of concealment from the trustee or other court officers. (52 Stat. 840)

The dates of those amendments are of importance in this appeal. Many of the cases relied upon by appellants construe early penal provisions of the bankruptcy laws which required "continuing concealment" through the entire bankruptcy proceeding or concealment from a trustee rather than from trustee or from creditors.

Transfer in contemplation of bankruptcy became a crime in 1926. Concealment from creditors in any bankruptcy proceeding was first made a penal offense by the Chandler Act of 1938. *Collier on Bankruptcy, 14th Edition, Section 29.*

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

in other words:

> "If reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt the question is one of fact and must be submitted to the jury." *Remmer* v. *United States*, 205 F. 2d 277, 288 (C.A. 9, 1953), reversed on other grounds, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450.

Where, as here, appellant contends that the evidence was not sufficient to support the conviction, the appellate court is to treat the basic facts as being those which the jury could have found from the evidence, if every conflict in the testimony had been resolved in favor of the Government. *Todorow* v. *United States*, 173 F. 2d 439 (C.A. 9, 1949) cert. den. 337 U.S. 925, 93 L.Ed. 733, 69 S.Ct. 1169.

In the instant case, the facts relating to appellant's state of mind in transferring the cash register are as set forth below, if all conflicts in the evidence are resolved against appellants.

They were officers, directors and agents of Edwards Shaver Departments, Inc. During 1952 that corporation had concessions which were operated as the electric razor departments of department stores in Washington, Oregon, and California. The corporation was incorporated under the same name in both Cali-

fornia and Washington; but the distinct corporate entities were ignored, and both were treated as one corporation by appellants during 1952.

Max T. Edwards also owned two corporations in Vancouver, B. C., Canada. One of them operated a retail cutlery store and the other a retail electric razor store.

In addition to operating the department store concessions, Edwards Shaver Departments, Inc. had its own store in Seattle. Money and merchandise was freely exchanged between the various retail outlets in British Columbia, Washington, Oregon and California. They were all part of the same chain.

A large volume of business was done, but the corporation lost money. It was obligated by contracts to operate many concessions which were not profitable, as well as some that were. As of the end of 1952, it had a lease requiring it to pay $500.00 per month rent for three years upon the space occupied by the store in Seattle, although that store was not profitable.

The only way the corporation could operate at a profit was for it to either arrange some way of getting a higher percentage of profit in the department store concessions, or eliminate the unprofitable locations. Neither alternative was open to Edwards Shaver Departments, Inc., because of its obligations under written contracts.

During 1951 and 1952, the business in the United States had continued to exist only by reason of the fact,

among others, that certain wholesalers of electric razors had supplied merchandise, in quantity, on long term credit. Such credit was not available for purchases by Edwards Shaver Departments, Inc. after 1952.

As of the end of 1952, Edwards Shaver Departments Inc., had assets with a book value of approximately $60,000.00 and a liquidation value that was only a fraction of $60,000.00. At the same time it owed its creditors, other than Max T. Edwards, approximately $123,000.00. At the beginning of December of 1952 it also owed Max T. Edwards nearly $35,000.00.

At that time there was no possibility that the corporation could continue with business as it had done in the past. Unless the creditors voluntarily canceled the largest part of the obligations of the corporation and the department stores made new concession arrangements, allowing the corporation to operate at a profit, bankruptcy was certain. The inevitable insolvency proceedings could not be under state law because the commingling of the assets and liabilities of the Washington and California corporations prevented any effective liquidation under state laws.

Appellants had acquired the "know-how" to operate department store shaver concessions profitably, but could not do so with Edwards Shaver Departments, Inc. It was hopelessly encumbered with bad contracts and large debts. Appellants wanted to rid themselves of the contracts and debts and start over with a new

corporation. They attempted to do just that, beginning in December of 1952.

Appellants asked for, and received, advance payments of money earned by the concessions, but not due and payable from the department stores until January 10, 1953. They then caused $36,500.00 to be transferred to Max T. Edwards and his corporations in Canada. That was more than full repayment of money he had loaned to Edwards Shaver Departments, Inc.

Having caused the debt to Max T. Edwards to be paid in full, appellants, on February 17, 1953, sent letters to the other major creditors advising them that they would have to wait for their money.

On the same day an order was placed with a moving company for shipment of the better furniture and the cash register from the store in Seattle to one of the Max T. Edwards corporations in Canada. On February 20, 1953, the moving company received the cash register and the furniture from the Seattle store, and started it on its way to Canada.

On February 25, 1953 Max T. Edwards advised the controller of the largest creditor that appellants were not interested in any arrangements which did not involve a cancelation of seventy-five per cent of the indebtedness of Edwards Shaver Departments, Inc., and long term arrangements for payment of the balance. On February 27, 1953, Max T. Edwards requested a representative of one of the California cred-

itors to try to hold another California creditor in line so that it would not throw Edwards Shaver Departments, Inc. into some sort of insolvency proceedings.

The latter creditor had been corresponding with Edwards Shaver Departments, Inc. for some time in an attempt to collect its account, but the correspondence was kept by appellants and never produced either for the receiver, the trustee, or for the jury in the criminal trial. Max T. Edwards falsely testified at the trial that he never expected legal action by that creditor.

The attachment by that creditor of California assets of Edwards Shaver Departments, on February 27, 1953, precipitated bankruptcy. The California bankruptcy occurred in March of 1953. The Washington bankruptcy was deferred until May 7, 1953, because of the intervening appointment of a State receiver. That state officer soon discovered that the past operation of the Washington and California corporations as one corporation mandated federal bankruptcy. On his recommendation, a petition for involuntary bankruptcy was filed in Washington and was followed by a transfer of all assets of the bankruptcy in California to the bankruptcy trustee in Washington.

During 1952 Edwards Shaver Departments, Inc., had explained losses of $30,000.00 and additional large losses which were not explained by appellants. The unexplained losses resulted from shipments of electric razors to one of the Vancouver corporations. Records

of such shipments were made and kept in Seattle. They covered many shipments of large quantities of valuable electric razors, but all such records were removed by appellants from the files of the corporation before the receiver took over.

Appellants falsely testified at the trial that the value of shavers sent to Canada was less than the value of cutlery shipped from Canada to Seattle in an exchange of merchandise between the various Max T. Edwards' corporations.

Two days before the cash register was picked up by the moving company for transfer to Canada, appellants caused a certificate of incorporation be filed for Shaveraids, Inc., with the Secretary of State, Nevada. It was their intention to take over the profitable concessions in the name of Shaveraids, Inc., free of the old obligations of Edwards Shaver Departments, Inc., after the latter went through bankruptcy. Money for Shaveraids, Inc., came from the bank account of Edwards Shaver Departments, Inc. With their "know how" in the retail electric shaver business, appellants were in a favorable position to make such arrangements with the department stores and then buy up the assets of the bankrupt at distress sale. That was their intention.

Shaveraids, Inc., succeeded in doing just that with respect to the profitable Seattle concession, but was unsuccessful in attempts to obtain the profitable California concessions.

Appellants pretended to the creditors and to the department stores that it was necessary to withdraw money to Canada to repay obligations to banks, but not all of the money so withdrawn was used for that purpose. The proceeds of some of the money was still in the possession of Max T. Edwards after May 7, 1953 when both corporations were bankrupt, but he did not turn such proceeds, and other property of the bankrupt, over to the trustee.

The appellants have kept, and used as their own, property of the bankrupt including the cash register, furniture, trade names, an adding machine and records relating to concession possibilities in other department stores.

Appellants falsely testified at the trial that the reason the cash register was shipped to Canada was that the store was being closed, and that there was no further use for the cash register in the United States.

* * * * * * * *

There is, of course, much evidence in the record which is contrary to what has been said above concerning the circumstantial evidence of appellant's state of mind on February 20, 1953, when the cash register was transferred to Canada. Yet, as appears from the detailed references to the evidence at the trial, at pages 1 - 33 of this brief, there was evidence from which the jury could have found the facts to be as above set forth. If every conflict in the testimony had been resolved in favor of the appellee the

jury would have so found. We submit that the evidence, as so construed, is susceptible of only one hypothesis with relation to appellants' state of mind. They knowingly and fraudulently transferred the cash register to Canada in contemplation of a bankruptcy proceeding against Edwards Shaver Departments, Inc.

POINT II

IF THERE WAS NO PREJUDICIAL ERROR AS TO COUNT XIX, ALLEGED ERROR AS TO OTHER COUNTS WOULD NOT REQUIRE REVERSAL

The sentences imposed on other counts were concurrent with that fixed as punishment for the fraudulent transfer of the cash register charged in Count XIX. If this court decides that the conviction on Count XIX should be affirmed, it need not consider objections raised by appellants in relation to their conviction on other counts in the indictment.

Fisher v. *United States*, 254 F. 2d 302, 304 (C.A. 9, 1958);

Kiyoshi Hirabayashi v. *United States*, 1943, 320 U.S. 81, 85, 105, 63 S.Ct. 1375, 87 L.Ed. 1774;

Pinkerton v. *United States*, 1946, 328 U.S. 640, 641 - 642 note 1, 66 S.Ct. 1180, 90 L.Ed. 1489;

Lawn v. *United States*, 1957, 355 U.S. 339, 359, 2 L.Ed. 2d 321, 78 S.Ct. 311.

Even if improper testimony had been admitted in support of the charges made in other counts, such facts would not require reversal. This is true with respect both to the counts resulting in concurrent sentences

and to those on which the jury found appellants not guilty. *Blassingame* v. *United States*, 254 F. 2d 309 (C.A. 9, 1958). But in any event there was no evidence admitted at the trial which was not properly before the jury with relation to appellants' state of mind when they transferred the cash register.

POINT III
CONVICTIONS ON THE REMAINING COUNTS WERE PROPER IN ANY EVENT

The remaining counts charged concealment, after bankruptcy, of sums of money and of the cash register by both appellants and similar concealment of an adding machine by Gilbert Edwards. The possibility that such concealment may constitute a single transaction rather than multiple offenses, does not justify reversal of any of the concurrent sentences. *Fisher* v. *United States, supra*, 254 F. 2d 302, 304 (C.A. 9, 1958).

The concealment was unlawful if it was one offense or several. Appellants were officers and directors of an insolvent Washington corporation. As such they were fiduciaries charged with the conservation of its assets. *Larsen* v. *A. W. Larson Const. Co.*, 36 Wn. (2d) 271, 281 (1950). Those assets were a trust fund for all creditors and no creditor was entitled to preference over any other. *Terhune* v. *Weise*, 132 Wn. 208, 211 (1925).

Appellants violated their fiduciary duties by preferring Max T. Edwards over other creditors and by

transferring part of the property of that trust to themselves. Except insofar as the rights of innocent third parties intervened, the property so transferred remained that of the trust. *Mid-State Insurance Co.* v. *American Fidelity & Casualty Co.*, 234 F. 2d 721, 727 (C.A. 9, 1956).

Some of the property may have been converted into another form (e.g., the $10,000 note from Mrs. Edwards to Max T. Edwards) but that does not affect the rights of the trust. *City of Spokane* v. *First National Bank of Spokane, et al*, 68 Fed. 982 (C.A. 9, 1895).

When the petitions in bankruptcy were filed, the trust fund, consisting of all of the assets of the insolvent corporation, became property of the bankrupt. Those assets included the property wrongfully transferred by the fiduciaries to themselves and the proceeds of such property remaining in their possession or under their control. *United States* v. *Shireson*, 116 F. 2d 881, 883 (C.A. 3, 1940), 132 A.L.R. 1157.

Appellants in keeping those assets beyond the jurisdiction of the bankruptcy court were "concealing" property "belonging to the estate of a bankrupt," although the creditors and trustee soon learned of the fraud and despite the action of the trustee in starting suit in a Canadian Court to recover the assets removed from the jurisdiction of the bankruptcy court. *United States* v. *Zimmerman*, 158 F. 2d 559, 560-561 (C.A. 7, 1946).

Appellee is aware of the decision of the Sixth Circuit in *Levinson* v. *United States*, 47 F. 2d 451, and that of the Second Circuit in *United States* v. *Alper*, 156 F. 2d 222. At first reading it would appear that those cases are authority for the proposition that appellants could not be guilty of those counts which charged concealment of the money which was paid to Max T. Edwards as a preference.

Certainly the decisions do not bear upon appellant's guilt in concealing the cash register or the offense of Gilbert Edwards in concealing the adding machine. Nor, in fact, do they provide any real guide in determining if the convictions for concealing the money should be affirmed.

Neither *Alper* nor *Levinson* involved a fraudulent transfer by directors of an insolvent corporation in the State of Washington, with its strictly applied trust fund theory of corporate assets. *Terhune* v. *Weise*, *supra* (132 Wn. 208, 211). In the instant case the law prevented the change of ownership which could have occurred in *Alper* and in *Levinson*.

Nor are those decisions so well reasoned that they should be followed by this court, even if the facts were similar. They encourage the kind of fraud which Congress by repeated amendments of the penal laws, relating to bankruptcy, has attempted to prevent. *Collier on Bankruptcy*, 14 Ed., § 29, pages 1144-1145. It is all too easy for a dishonest business man to have the books of his corporation show obligations of one

kind or another to him. If he could then pay those "debts" to himself as a mere preference with no fear of criminal sanctions for thereafter hiding the money from the creditors, much of the value of 18 U.S.C. § 152 would be destroyed. A rule that money paid in fraudulent preference cannot be criminally concealed constitutes an invitation to the introduction of a variety of such fraudulent schemes into the commerce of the nation.

Appellants cite many cases holding that the type of concealment with which they have been charged must be from the trustee. Those cases correctly interpret the law as it existed prior to the enactment of the Chandler Act of 1938. Subdivision 1 of § 29 of the Bankruptcy Law of 1898 prohibited concealment from the trustee or other court officer charged with the care of the assets of a bankrupt. The 1938 amendment added, as a new crime, the similar concealment from creditors in any bankruptcy proceedings.

Some cases decided after the 1938 amendment consider offenses committed earlier, and others construe indictments charging concealment "from the trustee."

In the instant suit the Government did not allege or prove the date of the appointment of the trustee in the Washington bankruptcy proceedings. It proved that the bankruptcy occurred in California in March of 1953; that a bankruptcy receiver was appointed in

a State Court receiver, and that it therefore was not property of the bankrupt on May 7, 1953 or thereafter.

The jury's verdict with relation to Count XIX established that the same cash register was fraudulently transferred before the receiver was appointed. That fraudulent transfer was to Edwards, Ltd., a Canadian corporation owned by Max T. Edwards. A fraudulent transfer is not a sale. No rights of innocent third parties were involved so the cash register continued to be part of the trust fund, consisting of all of the assets of the insolvent, until the receiver was appointed. On and after May 7, 1953 the cash register was an asset of the bankrupt, not property of Max T. Edwards' corporation in Canada.[4]

It also appears that the jury was not required, under the evidence, to find that Edwards, Ltd. had any title to, or interest in, the cash register. Appellants testified that Max T. Edwards had the cash register at all times and that either of them could have produced it. If they did not mean what they said under oath, it was up to their counsel to show the error. The suggestion on page 37 of appellants' brief that the Government should have pursued the matter further apparently ignores the fact that appellants were represented at the trial by able and experienced trial counsel of their own selection.

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[4]The reference to full disclosure at page 33 of the brief of appellants is somewhat hard to understand in view of the earlier concession (at page 16) that there were no book entries showing the transfer of the cash register.

At page 38 of that brief there is a statement that a particular kind of instruction should have been given, and that the court's failure to give that instruction "constituted a fatal and prejudicial factor in bringing about a verdict of guilty." Appellants did not request such an instruction or take exception to the omission. (R. 25-30, 815-816).

Appellants, at pages 38-39 of their brief, urge that there could be no criminal concealment of the cash register from the trustee because there is no proof of the date of his appointment. The position of appellee that concealment from either the California receiver, the Washington trustee or the creditors is all that 18 U.S.C. § 152 requires is covered by other parts of this brief.

So far as concealment of the cash register is concerned the precise date of appointment of the Washington trustee appears completely immaterial. He sued appellants in Canada while Max T. Edwards admittedly still had the cash register and was still willing to return it to Gilbert Edwards if the latter had asked for its return.

Brief of Appellants, pp. 39-40

The argument of appellant, Gilbert Edwards, at pages 39-40 of appellants' brief takes no account of the following facts. Max T. Edwards testified that he would return the adding machine at any time that Gilbert requested it. The record does not disclose

any payment to the insolvent or to any receiver or trustee for the adding machine. There was evidence from which the jury could determine that Gilbert Edwards was a principal or accessory in concealment of the adding machine, after appellants had jointly and fraudulently taken it from the insolvent corporation. Gilbert Edwards admitted taking the machine and the jury had only appellants' words to support a claim that Gilbert Edwards did not have physical possession on and after May 7, 1953.

Brief of Appellants, pp. 40 - 43

The Government concedes that there could have been no concealment on and after May 7, 1953 if none of the assets, or the proceeds of them, then were in the possession of, or available to, the appellants. Both the California and the Washington corporations had become bankrupt by May 7, 1953. 18 U.S.C. § 151. But the date of the appointment of the trustee is not important. The proof clearly showed that there were creditors. The indictment charged concealment from creditors.

If the date of the appointment of a trustee were important, appellant could not benefit from the government's failure to prove the date of appointment of the trustee in Washington. The proof showed that a Federal bankruptcy custodian was appointed on March 27, 1953 in the California bankruptcy of Edwards Shaver Departments, Inc.

The proof further showed that the adding ma-

chine and the cash register were still in the possession and control of appellants on and after May 7, 1953.

Even if the jury believed appellants' testimony about large sums of money being paid to banks and otherwise spent before May 7, 1953, they were nevertheless bound to consider the admission of Max T. Edwards that on May 7, 1953 he had a $10,000 note from Mrs. Edwards which had been given to him in exchange for part of the money taken from Edwards Shaver Departments, Inc.

The jury also heard the admission of Gilbert Edwards that he, at the time of trial, still had the Bon Marche concession in the name of Shaveraids, Inc. That corporation was set up with money taken from the bank account of Edwards Shaver Departments, Inc. and charged in its books as a miscellaneous expense.

Brief of Appellants, pp. 43 - 46

It is unnecessary to argue the presumption of continued possession in view of admissions that the cash register, the adding machine and the $10,000 note were still in possession of appellants on and after May 7, 1953. It is noted that the decision of the Supreme Court, relied on by appellants (page 43 of their brief), supports the Government's contention that the jury might properly infer that $36,500 was not spent in about four months. See *Maggio* v. *Zeitz*, 333 U.S. 56, 65-66, 92 L.Ed. 476, 68 S.Ct. 401.

The statements on pages 44 and 45 of appellants' brief to the effect that the Government's own evidence showed that the Seattle store was to be closed, should not go unchallenged. A witness produced by the government testified that appellants planned to sell or close that store (R. 318-319). That was not "the government's own evidence." It was new matter gone into on cross-examination, by appellants' trial counsel, of an accountant who worked for Edwards Shaver Departments, Inc. and later assisted all parties to prepare the case for trial (R. 95). As appears from Point I of this brief, the government's evidence was that the store would not be closed while the rental of $500 per month continued to be payable.

Brief of Appellants. pp. 46 - 51

On the evidence adduced at the trial any question as to a possibility that the concealment of assets of the bankrupt was done in good faith, was for the jury.

The cash register and the adding machine were concealed in a typical manner. They were taken away before bankruptcy and no record was left to indicate their absence. A more sophisticated concealment was practiced by appellants with regard to the money. They removed it beyond the jurisdiction of the bankruptcy court and then contended that the bankrupt had no rights with reference to it. Both types come within the prohibition of the statute. It is the fact, not the mode of concealment, which is important.

U. S. v. *Zimmerman, supra*, 158 F. 2d 559 (C.A. 7, 1946);

U. S. v. *Schireson, supra,* 116 F. 2d 881, 883 (C.A. 3, 1940);

U. S. v. *Switzer,* 252 F. 2d 139, 142 (C.A. 2, 1958), cert. den. 357 U.S. 922, 2 L.Ed. 2d 1366, 78 S.Ct. 1363.

The statement on page 48 of appellants' brief, that the trustee did not communicate with Max T. Edwards, is not substantiated by the record. It is true that Max T. Edwards testified that he had no recollection as to whether he had correspondence from the trustee and referred it to his counsel, but Max T. Edwards did admit that he was sued by the trustee in Canada.

Such communication was not a necessary part of the government's proof. The law does not require the trustee, or anyone else, to demand the return of property of the bankrupt which is being unlawfully concealed.

U. S. v. *Wodiska, supra,* 147 F. 2d 38, 39 (C.A. 2, 1945);

U. S. v. *Comstock,* 161 Fed. 644 (D.C. R.I., 1908).

At pages 49-50 of appellants' brief some older cases are cited in support of a statement that the crime of concealment in bankruptcy requires such concealment "during the whole course of the bankruptcy proceedings." The government's position that under the present statute the concealment need only be after the bankruptcy occurs, and need not even continue until the trustee is appointed, has been set forth earlier in this brief. It will not be reargued here. We now mere-

ly dispute the claim that concealment must continue until the bankruptcy proceedings are terminated. The most recent of the old cases cited by appellant in support of that proposition is *Gretsch* v. *United States*, 231 Fed. 67 (C.A. 3, 1916). That case has been expressly overruled. *United States* v. *Schireson, supra*, 116 F. 2d 881, 884 (C.A. 3, 1940). If continuing concealment was ever a prerequisite to prosecution, it is clear that the requirement does not exist under the more modern statutes.

Collier on Bankruptcy, 14th Edition, § 29, pp. 1152-1153;

U. S. v. *Weinbren*, 121 F. 826, 827-828 (C.A. 2, 1941).

Brief of Appellants, pp. 51 - 57

Appellants' arguments as to the evidence concerning the fraudulent transfer of the cash register charged in Count XIX, will not be answered at this point in this brief. The government's position on that has been detailed in Point I of this brief. Yet, since we contend that the question was for the jury, it is appropriate to point out exactly what the Supreme Court said about contemplation of bankruptcy in *Conrad, Rubin and Lesser* v. *Pender*. That case is relied upon by appellants and cited at page 53 of their brief. The Supreme Court there held (289 U.S. 472, 478-479, 77 L.Ed. 1327, 53 S.Ct. 703):

"But it is insisted, in the instant case, that the payment to appellants could not properly be regard-

ed as made in contemplation of bankruptcy, and hence within the jurisdiction to reexamine, because the payment was for the purpose of engaging appellants to conduct negotiations with creditors in order to arrange for an extension of time, and, if necessary, for the operation of the business under the creditors' supervision, and thus to avoid a forced liquidation and ultimately to restore the business to a sound basis. We find no ground for saying that the fact that such purposes were in view establishes, as matter of law, that the payment was not in contemplation of bankruptcy. On the contrary, negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. 'A man is usually very much in contemplation of a result which he employs counsel to avoid.' Furth v. Stahl, supra. See also, In re Klein-Moffett Co., 27 F. (2d) 444; Slattery v. Dillion, 17 F. (2d) 347; In re Lang, 20 F. (2d) 239."

We agree that appellants could not be guilty of the charge in Count XIX of fraudulently transferring the cash register if they acted in good faith with an honest belief that what they were doing was right and proper, but dispute their interpretation of the evidence.

The argument at page 54 of their brief to the effect that the government had a burden of showing that appellants knew the contents of the bankruptcy law is not supported in the cases. One of the authorities relied on by appellants is *Babb* v. *U. S.*, 252 F. 2d 702, 708 (C.A. 5, 1958), cert. den., 356 U.S. 974, 2 L. Ed. 2d 1147, 78 S.Ct. 1137. The defendants in that case urged that the trial court should have charged that the Government had a burden of showing the defendant

knew he was violating a specific law and actually knew the provisions of that law. The court held (page 708), "We do not understand that the principle announced in the Hardgrove and the Yarborough cases goes further so as to require actual knowledge of the provisions of the specific law. (Citing authorities.)"

The record in the instant case discloses ample circumstantial evidence to support the jury's finding that appellants had an intent to defeat the bankruptcy law. Laymen as well as lawyers can be found guilty of the crime.

Brief of Appellants, pp. 57 - 58

Appellants' argument that the government failed to prove venue as to Max T. Edwards appears to be completely answered by Sections 2, 3237 and 3238 of Title 18, U.S.C. Section 2, as applied to the evidence in this case, makes Max T. Edwards punishable as a principal or accessory for those parts of the crime which were physically done in Seattle, Washington by Gilbert Edwards, his accomplice. Section 3237 permits prosecution in any of the districts when an offense is begun in one district and completed in another, or is committed in more than one district. Section 3238 permits prosecution in the district where the offender is found if the offense is committed out of the jurisdiction of any particular state or district. See also,

U. S. v. *Schireson, supra,* 116 F. 2d 881 (C.A. 3, 1940);

U. S. v. *Greenstein*, 153 F. 2d 550, 551 (C.A. 2, 1946);

U. S. v. *Knickerbocker Fur Coat Co., supra*, 66 F. 2d 388 (C.A. 2, 1933), cert. den., 290 U.S. 673, 78 L.Ed 581, 54 S.Ct. 91;

U. S. v. *Olweiss*, 138 F. 2d 798, 799-800 (C.A. 2, 1943), cert. den., 321 U.S. 744, 88 L.Ed. 1047, 64 S.Ct. 483.

Brief of Appellants, pp. 62-64

The government's position in regard to the matters covered by appellants' specifications of error No. 4, argued at pages 62-64 of their brief, has been set forth in Point II of this brief.

Brief of Appellants, pp. 65-66

Specification of error No. 5 concerns admission of Exhibit 24, a letter from Max T. Edwards to the Washington State Court receiver, demanding a return of records of "my California corporation (Edwards Shaver Departments, Inc.)". It was properly admitted as tending to show intent in doing the acts charged in the indictment. The Washington and California corporations had been operated as one. There was convincing evidence that appellants' planned to take over the profitable concessions of Edwards Shaver Departments, Inc., free of the debts and bad contracts of that corporation. Records of the California portion of Edwards Shaver Departments, Inc. would have had no value to appellants except in attempting to carry out that scheme. The California corporate assets had been attached at an earlier date and a California bank-

ruptcy receiver of Edwards Shaver Departments, Inc. was appointed on the very day that Exhibit 24 was sent to the State Court receiver in Washington.

Brief of Appellants, pp. 66 - 68

Specification of error No. 6 concerns admission of Plaintiff's Exhibit No. 12, a check of Edwards Shaver Departments, Inc. to Gilbert Edwards in the sum of $2,000.00, dated February 12, 1953 and signed by Max T. Edwards. The government proved that such $2,000.00 payment was entered in the records of Edwards Shaver Departments, Inc. as a miscellaneous disbursement and that it was used to set up Shaveraids, Inc. That was the corporate vehicle which appellants hoped to use in taking over the profitable part of the shaver concession business free of the bad contracts and the large financial burdens of Edwards Shaver Departments, Inc. Can it be seriously contended that proof of such a payment was not competent evidence of appellants' respective states of mind in doing the things charged in the indictment?

There is an additional reason why the exhibit was properly admitted in evidence. We do not find in pages 66-68 of appellants' brief, or elsewhere in their brief or in the record, any explanation as to why Gilbert Edwards never repaid $200.00 to any receiver or trustee. If, as appellants claim, the $2,000.00 covered by Exhibit 12 was a repayment of $1800.00 owed to Gilbert Edwards by the corporation and an advance of $200.000, the $200.00 should have been repaid. Ex-

hibit 12 therefore showed another fraud, similar to those charged in the indictment. *McCoy* v. *United States, supra*, 169 F. 2d 776, 783 (C.A. 9, 1948).

Brief of Appellants, pp. 68 - 69

Specification of error No. 7 concerns proof that Shaveraids, Inc. actually purchased the assets of the Seattle concession. It was, we submit, properly admitted as proof of appellants' intent. It was direct evidence of an intention which the Government claimed the appellant had in transferring the cash register; i.e., an intention to operate the profitable concession by Shaveraids, Inc., free of the debts and contracts of the old corporation.

Brief of Appellants, pp. 69 - 70

Specification of error No. 8 concerns admission of evidence that the general creditors, other than Max T. Edwards and Gilbert Edwards, received less than 17 percent of the amount of their proven claims.

Presumptively, the amount paid represented the proportionate share of each creditor in the liquidation value of the assets of Edwards Shaver Departments, Inc. It was the best evidence of such relationship between the amount Edwards Shaver Departments, Inc. owed to all of its creditors and the amount which could be paid to such creditors as the result of a forced sale of the assets.

Appellants were more familiar with their corporation than was anyone else. If they believed that the

percentage paid was not the proper one, they could have so testified. We find no such testimony in the record.

There was no better, or fairer, way of demonstrating to the jury just what appellants expected they would receive from Edwards Shaver Departments, Inc., if they had lived up to their fiduciary obligations and took their turn with the other creditors in receiving a fair share of the assets of the insolvent. Having that in mind, they elected to ignore their duty as fiduciaries and pay themselves in full. The evidence, therefore, was material on the issues of intent raised by the pleas of not guilty to each of the counts in the indictment.

Brief of Appellants, pp. 70 - 72

Specification of error No. 9 concerns the court's refusal to admit Exhibit A-22, a tabulation by Max T. Edwards of his claims concerning money spent by him after withdrawing $36,500.00 from Edwards Shaver Departments, Inc. in December of 1952 and January of 1953. Appellants argue, and we concede, that the court had discretion to admit such a summary. Apparently, that was the court's view, also. The trial Judge ruled (R. 501), "Summaries by accountants, or by parties who are not witnesses, are not as a matter of right, admissible." That should end the matter as there is no appeal from a discretionary ruling

The trial Judge's subsequent statement (R. 501): "The Court has no right, I do not believe, to admit it over objection", must be read in context. That includes the concessions of Government counsel which are indicated only by asterisks in the long quotation appearing at pages 23-24 of appellants' brief. He said: "I have no objection, your Honor, if the witness uses it to refresh his recollection, so long as it is not considered a paper in evidence." Government counsel later stated, "Your Honor, may I interrupt for a moment to make a suggestion? I will withdraw any objection to this going into evidence if it is stipulated that the lack of objection on the part of the Government is not to be construed as any concession that the paper is either complete or accurate."

Appellants' counsel refused to so stipulate and the court finally refused to admit the exhibit. It is printed as Appendix "B" to appellants' brief. After reviewing it, this court may conclude that in any event the exhibit would have confused, rather than aided, the jury.

Brief of Appellants, pp. 72 - 76

Specification of error No. 10, concerns the trial court's denial of motions for a new trial. It is supported by arguments that the sentences were severe and that the trial court did *not* give the jury instructions which were *not* requested by either party. It appears that neither the exception nor the arguments

are properly before this court. They were all matters for the trial court.

None of the alleged omissions in the instructions are such that the court was required to give them in the absence of a request, even if one or more of them might have been proper in the event of a timely request. In fact, appellants now contend that the trial court, without any request, was required to instruct the jury that the defendants should have been found not guilty if they had been acting on advice of an attorney. At pages 73-74 of their brief they urge reversal because the trial court did not instruct the jury to acquit if appellants acted on the advice of counsel. At pages 54-55 of their brief they contend that they did not have any such advice.

CONCLUSION

Appellants were clearly guilty of fraudulently transferring the cash register with intent to defeat the bankruptcy law. There was no error requiring reversal of their conviction of that crime. That conviction, standing alone, warrants affirmance without consideration of their guilt of other charges in the indictment. Yet, they were guilty of the other charges. They concealed the adding machine after both of their corporations became bankrupt. They similarly concealed money which had been fraudulently taken from the corporation before bankruptcy. Gilbert Edwards, alone, was also guilty of concealing, after bankruptcy, an adding machine which he fraudulently took from the corporation in contemplation of that bankruptcy. The judgments should be affirmed in all respects.

Respectfully submitted,

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APPENDIX "A"

1952 SALES AND EXPENSES OF SEATTLE STORE

	Total Sales	Sales Tax	Federal Tax	Shaver Sales	Accessories	Repairs	Products	Misc.	Cutlery	China	Leather	Grind'g
JANUARY	$3,465.69	$ 96.17	$ 8.10	$1,219.45	$734.11	$1,001.54	$186.45	$126.87	$81.05	$11.95		
FEBRUARY	3,033.23	82.33	5.11	985.98	645.64	923.16	134.52	144.74	95.90	15.85		
MARCH	3,000.87	85.53	7.10	947.67	717.05	768.21	157.26	172.35	120.65	25.05		
APRIL	3,310.94	92.88	7.60	1,186.09	860.16	566.31	146.78	347.91	95.31	7.90		
MAY	3,592.22	103.03	8.00	1,425.61	793.05	631.77	174.40	306.17	108.19	22.55	$19.45	
JUNE	3,605.14	99.06	10.15	1,371.42	649.37	709.40	153.37	238.01	337.13	12.95	22.33	$ 1.95
JULY	3,895.93	111.26	11.50	1,315.90	734.60	770.75	190.29	380.55	341.09	7.95	19.98	11.45
AUGUST	4,651.32	132.13	6.36	1,410.33	779.81	889.63	211.53	737.50	493.31	3.50		22.04
SEPTEMBER	4,458.53	128.94	8.30	1,458.15	741.94	907.04	251.17	379.25	541.59	26.35		15.80
OCTOBER	4,337.79	122.23	9.44	1,330.53	893.83	701.88	209.40	469.83	563.07	22.40		15.18
NOVEMBER	3,555.53	102.50	10.42	928.99	709.51	655.12	148.67	322.96	569.78	97.43	4.95	5.20
DECEMBER	8,494.47	238.28	29.98	2,459.84	936.06	778.18	231.57	1.088.23	1,990.97	670.73	65.88	4.75
TOTALS	$49,401.66	$1,394.34	$122.06	$16,039.96	$9,195.13	$9,302.99	$2,195.41	$4,714.37	$5,338.04	$924.61	$132.59	$76.37

Total Sales less total Taxes — $47,885.26.

Gross Profit computed at 47.5% of Net Sales excluding Taxes (R. 609) — $22,745.50.

Gross Profit computed by allowing 90% profit on Repairs (R. 690-691), 60% on Products (R. 551, 710) and 40% on all other Net Sales excluding Taxes (R. 551, 687) — $24,258.37.

Total Operating Expense exclusive of Rent (R. 609-611) — $18,000.00.

Rent payable under lease in any event if store closed or kept open (R. 608-609) — $6,000.00.